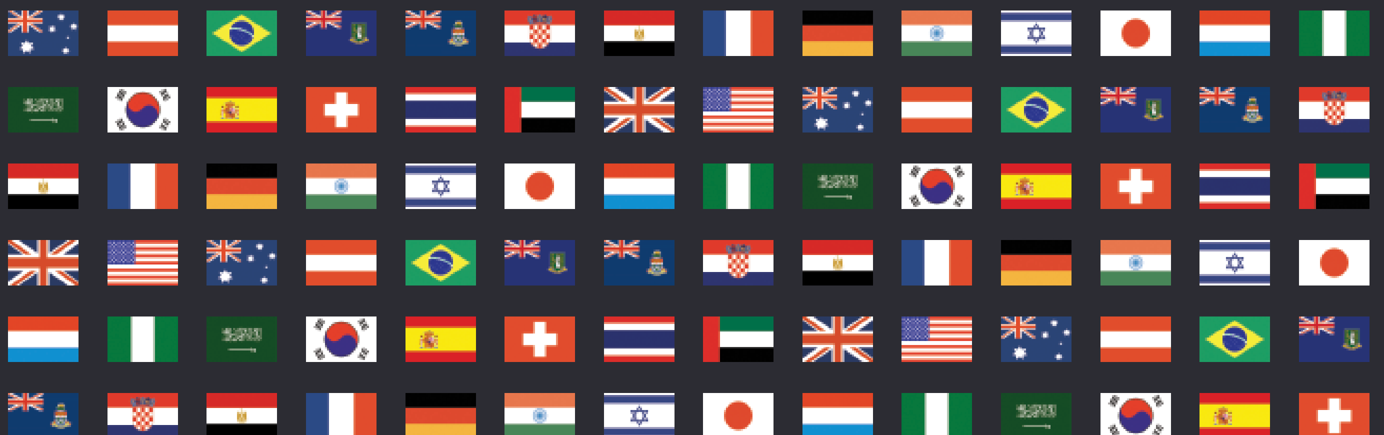
Private Equity 2020

Contributing editor
Atif Azher



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Getting The Deal Through

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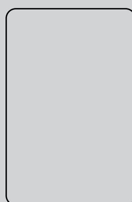

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Atif Azher
Simpson Thacher & Bartlett LLP

Lexology Getting The Deal Through is delighted to publish the sixteenth edition of *Private Equity*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on France, Spain and the United Arab Emirates. The report is divided into two sections: the first deals with fund formation in 17 jurisdictions and the second deals with transactions in 20 jurisdictions.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We extend special thanks to the contributing editor, Atif Azher of Simpson Thacher & Bartlett LLP, for his assistance with this volume, and also extend thanks to Bill Curbow of Simpson Thacher & Bartlett LLP, the former contributing editor, who helped to shape the publication to date.

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TRANSACTIONS

Australia 146
Mark Stanbridge, Anton Harris, Stuart Dullard and Ben Landau
Ashurst

Austria 155
Florian Philipp Cvak and Clemens Philipp Schindler
Schindler Rechtsanwälte GmbH

Brazil 162
Carlos José Rolim de Mello, Alexandre Simões Pinto, Bruno Sartori de Carvalho Barbosa, Patricia Eid and Vitor Arantes
Souza, Mello e Torres Sociedade de Advogados

British Virgin Islands 168
Andrew Jowett and Rebecca Jack
Appleby

Cayman Islands 174
Chris Humphries and Jonathan McLean
Stuarts Walker Hersant Humphries

Croatia 179
Branko Skerlev
BMWC Law Firm

Egypt 184
Aya Sabry and Nora Harb
Thebes Consultancy

France 188
Saam Golshani, Alexis A Hojabr, Estelle Philippi, Franck De Vita, Samir Berlat and Alexandre Balat
White & Case

Germany 195
Tim Kaufhold and Tobias Jäger
P+P Pöllath+Partners

India 202
Aakash Choubey and Sharad Moudgal
Khaitan & Co

Japan 212
Asa Shinkawa and Masaki Noda
Nishimura & Asahi

Nigeria 219
Tamuno Atekebo, Eberechi May Okoh, Oyeniyi Immanuel and Oluwafeyikemi Fatunmbi
Streamsowers & Köhn

Saudi Arabia 225
Omar Iqbal and Razan Hassan
Legal Advisors Abdulaziz Alajlan & Partners in association with Baker & McKenzie Limited

South Korea 231
Je Won Lee and Kyu Seok Park
Lee & Ko

Spain 237
Lucas Palomar and Bojan Radovanovic
Cases & Lacambra

Switzerland 244
Patrik R Peyer, Daniela Schmucki, Till Spillmann and Philippe Weber
Niederer Kraft Frey

Thailand 252
Jirapong Sriwat and Apinya Sarntikasem
Nishimura & Asahi (Thailand) Co, Ltd

United Arab Emirates 258
Hasan Anwar Rizvi
RIAA Barker Gillette (Middle East) LLP

United Kingdom 263
Michael Preston, David Billington, Michael James and Georgia Moorhouse
Cleary Gottlieb Steen & Hamilton LLP

United States 272
Atif Azher, Peter H Gilman, Fred de Albuquerque and Jay Higdon
Simpson Thacher & Bartlett LLP

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Spain

Lucas Palomar and Bojan Radovanovic
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TRANSACTION FORMALITIES, RULES AND PRACTICAL CONSIDERATIONS

Types of private equity transactions

1 What different types of private equity transactions occur in your jurisdiction? What structures are commonly used in private equity investments and acquisitions?

Private equity transactions mainly consist of the acquisition of controlling stakes of private companies. Acquisitions involving minority stakes are also seen.

The acquisition is typically a share deal and the consideration is typically a cash payment.

Many large transactions are managed under an auction process, and mid-market deals tend to be handled through a bilateral approach. Private equity players try to contact target companies at an early stage to get bilateral deals with an exclusivity period.

In terms of structuring, private equity funds usually acquire a controlling stake in a business and set up a special purpose acquisition vehicle (SPV). The SPV executes the investment, obtains the necessary funding (normally through a combination of debt and equity) and may incorporate as shareholders the management team that co-invests with a minority stake. If the acquisition does not entail a 100 per cent acquisition of the target, it is complemented by a shareholders' agreement that includes standard and generally accepted provisions (relating to governance, reserved matters, lock-up period, rights of first refusal, tag-along and drag-along rights, put and call rights, etc).

Most private equity deals also include incentive arrangements with the management to align them with the interests of the sponsor (see question 9).

Some private equity transactions involve listed companies (see question 14), even though those affecting private companies are much more common in Spanish practice.

Corporate governance rules

2 What are the implications of corporate governance rules for private equity transactions? Are there any advantages to going private in leveraged buyout or similar transactions? What are the effects of corporate governance rules on companies that, following a private equity transaction, remain or later become public companies?

A distinction should be made between transactions involving private companies and those involving listed companies. As in many other jurisdictions, and as mentioned in question 16, corporate governance rules applicable to listed companies are more complex and cumbersome compared with those applicable to private companies.

Listed companies must comply with several mandatory requirements in terms of corporate governance, transparency, compliance, disclosure and stock exchange regulations. The alternative stock market (Mercado Alternativo Bursátil – MAB) is more flexible in terms of governance and compliance requirements, and it can be regarded as more attractive for companies that might not be large enough to be listed in the main stock market, as listed companies on the MAB operate within a simplified regulatory environment.

Private companies (in their various corporate forms) are much more common than listed companies in the Spanish economy. In particular, Spanish private limited liability companies are the most common corporate form among Spanish private companies. Shareholders have enough flexibility to tailor the corporate governance through the articles of association and shareholders' agreements.

The approach towards a private equity transaction is different depending on whether a private or a listed company is involved. Transactions involving private companies have much more flexibility, whereas transactions involving relevant stakes in listed companies entail mandatory takeover issues beyond certain thresholds (see question 14).

Consequently, going private has the advantage of being allowed to structure a more convenient and less cumbersome corporate governance structure from the perspective of the private equity firm.

Companies that remain public companies (ie, listed) upon a private equity transaction do not necessarily vary their corporate governance structure and, in any event, they continue subject to all the abovementioned requirements that apply to listed companies. Moreover, those that become listed pursuant to a private equity transaction must adapt their corporate governance scheme.

Issues facing public company boards

3 What are some of the issues facing boards of directors of public companies considering entering into a going-private or other private equity transaction? What procedural safeguards, if any, may boards of directors of public companies use when considering such a transaction? What is the role of a special committee in such a transaction where senior management, members of the board or significant shareholders are participating or have an interest in the transaction?

Any transaction involving a public company will be subject to the rules on insider trading and regular reporting. The board must abide by those rules. Stock exchange regulation considers any acquisition or sale of businesses as relevant information to be disclosed, which means that the listed company is obliged to announce it to the market and to the National Securities Market Commission. The board should check at what time the preparation of the transaction becomes insider information that obliges the publication of relevant information. Leakage of information and confidentiality is critical in this sense. The board should also take the necessary measures to prevent leaks.

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Issuers of securities and, specifically, listed companies, during the study or negotiation phases of any type of legal or financial transaction that can significantly influence the price of the securities or legal instruments affected, are required to limit the knowledge of the relevant information to the essential persons, to keep a record of such persons, to warn them of their duty of confidentiality, to establish security measures, to monitor the evolution of the market and to counteract any leakage of information by publishing a relevant fact.

Disclosure issues

4 | Are there heightened disclosure issues in connection with going-private transactions or other private equity transactions?

The disclosure system that concerns listed companies is based on the concept of 'significant participation', consisting of the acquisition or possession of 3, 5, 10, 15, 20, 25, 30, 35, 40, 45, 50, 60, 70, 75, 80 and 90 per cent of the voting rights of a listed company. The shareholders and those other persons who, regardless of the formal ownership of the shares, may dispose of the voting rights linked to the shares of a listed company must notify the National Securities Market Commission and the listed company the transfer – upwards or downwards – of those thresholds.

Going-private transactions are closely monitored by the National Securities Market Commission and broad disclosure duties are applicable. During the month following the date on which the decision to make the offer is made public, an authorisation request must be submitted to the National Securities Market Commission. The bidder must publish the offer once the authorisation is obtained, making available to the interested parties the corresponding prospectus. The board of directors of the company must write a detailed and reasoned report on the takeover public offer. There will be a term for the acceptance of the offer by the interested parties, which may not be less than 15 days or more than 70 days from the publication of the announcement.

Timing considerations

5 | What are the timing considerations for negotiating and completing a going-private or other private equity transaction?

A number of factors may affect the timing of a private equity transaction.

Regarding going-private transactions, the whole process depends on the type of takeover and the particular circumstances of each case. Regular voluntary takeover bids could take approximately three to four months; if a competing takeover bid concurs, the calendar may be extended for an additional month or more. There are several matters that could potentially extend the time frame. Additionally, it should be noted that the squeeze-out procedure must take place within a period of three months after the end of the term for the acceptance of the previous public takeover. In parallel and under the same circumstances there is a right of forced sale (or put) of the remaining minority shareholders.

In general terms, private transactions depend very much on each case and can take much longer depending on the circumstances. Proprietary deals in Spain usually include: an indicative offer, together with an exclusivity agreement for a term of three to four months, followed by a due diligence phase and the negotiation of the share purchase agreement (SPA) or investment agreement. The completion of the whole process usually takes no less than three to five months. Merger control clearances or any other conditions precedent may extend the term for closing substantially. In the case of acquisitions of partial stakes, the negotiation of the shareholders' agreement may also extend the timeline (depending on the number of parties involved).

When private transactions are structured as controlled auctions, the following steps are also commonly seen: sending teasers to potential buyers; confidentiality commitments, followed by access to information memorandum; submission of non-binding indicative offers; selection of a shortlist of potential buyers; data room and other due diligence information, including vendor's due diligence report; binding offers including mark-up of the SPA; negotiations with final bidders; selection of the final bidder; confirmatory due diligence (unless this step has been completed earlier); negotiations; signing; and closing.

Dissenting shareholders' rights

6 | What rights do shareholders of a target have to dissent or object to a going-private transaction? How do acquirers address the risks associated with shareholder dissent?

In general terms, public takeover regulations are orientated to protect the shareholders of listed companies. Apart from the preventive defensive measures a listed company may establish in its articles of association, Spanish law does not foresee a particular way for the shareholders to object to a takeover (provided, of course, that all legal requirements for the takeover are met). The way to oppose, in practice, is the non-acceptance of the offer, but that will obviously not prevent the takeover bid being successful if other shareholders approve it.

Dissenting shareholders could try to challenge the price offered by the bidder under certain circumstances, but the latter will not prevent completion of the process.

In the case of exclusion bids, which require the approval of the general shareholders' meeting of the concerned company, the resolution of the general shareholders' meeting may be challenged by minority shareholders (under the limitations and requirements applicable to the challenge of corporate resolutions).

Purchase agreements

7 | What notable purchase agreement provisions are specific to private equity transactions?

As a general rule, private equity transactions include purchase agreement provisions that are similar to other types of M&A transactions. However, there are some contractual provisions that are indeed specific to private equity transactions:

- The locked box mechanism is more common than other price determination mechanisms (such as the completion accounts mechanism), as it gives certainty about the purchase price and avoids post-closing adjustments (and the potential issues and conflicts related to such adjustments). When a completion accounts mechanism is chosen, the clause governing the adjustment of the purchase price is heavily negotiated.
- The tendency is to limit conditions precedent to the very minimum, as certainty of closing is of utmost importance, especially for sell-side sponsors (see question 20).
- Representations and warranties are typically very limited, and representations and warranties insurance policies are increasingly popular, most notably in large transactions (see question 15). However, private equity players acting on the buy side are very strict by requesting extensive representations and warranties and even guarantees securing the potential payment obligations of their counterparty (such as bank guarantees, escrow accounts and pledges). Certain insolvency considerations must be made when it comes to these sort of guarantees, so it is matter to be analysed on a case-by-case basis.
- With regards to restrictive covenants, non-competition and non-solicitation obligations for a term of one or two years following the closing of the transaction are often requested by buy-side sponsors.

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Participation of target company management

8 How can management of the target company participate in a going-private transaction? What are the principal executive compensation issues? Are there timing considerations for when a private equity acquirer should discuss management participation following the completion of a going-private transaction?

Subject to the approval of the board of the target, a private equity investor may offer incentive arrangements to management, in order to align (to the extent legally possible) the interests of management with the interests of the potential acquirer. The approval may be obtained if it fits the corporate interest. The relevant incentive arrangements shall be disclosed when the offer is made public.

Most private equity deals concerning private companies also include incentive arrangements with the management so as to align them with the interest of the investor. They may include a participation in the share capital of the company and ratchets, the latter subject to the internal rate of return obtained by the private equity on the exit. Incentive arrangements also include strong transfer restrictions and sell-back commitments in case of early termination (good-leaver and bad-leaver provisions). Additionally, and to ensure the exit process, the participation of management in the share capital is subject to drag-along provisions. The determination of the fair price that allows the trigger of the drag-along is also a key issue. Private equity players typically reject agreeing to pricing arbitration clauses, since they could jeopardise a quick exit.

Tax issues

9 What are some of the basic tax issues involved in private equity transactions? Give details regarding the tax status of a target, deductibility of interest based on the form of financing and tax issues related to executive compensation. Can share acquisitions be classified as asset acquisitions for tax purposes?

As a rule, buy-side acquisition costs related to a transaction are deductible for corporate tax purposes, although in most cases they shall be capitalised as higher cost of the shares, meaning that in an exit scenario they would reduce a potentially taxable capital gain derived from the sale.

Under certain circumstances, input value added tax (VAT) borne from transaction costs may be deductible or refundable, although particular and detailed case-by-case analysis would be required owing to the complexity of the applicable legislation and doctrine.

Spanish regulations allow the deduction of the interest expense derived from the financing of the acquisition. To achieve that, the purchase of the Spanish target may be conducted through a leveraged acquisition vehicle (Spanish holding) that forms a fiscal unity with the (operative) target company.

As a general rule, interest deduction of leveraged acquisitions are subject to a double limitation:

- first, deductibility of net financial expenses is limited to 30 per cent of the operating profit (similar to EBITDA) of the borrowing company, with a safe harbour of deductible expenses of €1 million; and
- second, when the acquired company is merged or joined to a fiscal unity, the 30 per cent EBITDA test is restricted to the operating profit of the acquiring or borrowing entity only (disregarding the operating profit of the acquired company or any other entity included in the fiscal unity).

Special rules in the case of hybrid instruments prevent the deductibility of expenses incurred with related parties to the extent that no income is subject to tax in the counterparty or this income is subject to a nominal rate below 10 per cent.

Financial expenses derived from profit participating loans granted by companies of the same group are not deductible as a rule.

Payment of interest to a non-resident lender entity is subject to withholding tax unless an exemption applies. In principle, payment of interests to a company that is resident within an EU country is exempt from taxation in Spain provided that it is the beneficiary (ie, that it meets the business purpose test). In case of lending companies outside the EU, the exemption may be provided by a double taxation treaty.

In the case of exit, capital gains derived from the sale of Spanish shares by a non-resident shareholder may be subject to taxation in Spain provided that the company is a property-rich entity (ie, when more than 50 per cent of its total assets is real estate located in Spain).

Compensation of tax loss carry-forward generated by the target company may be subject to limitation under certain circumstances when a change of control occurs; however, such limitations would not apply provided that the target company is not inactive, it carries out the same activity post-transaction and it is not qualified as a passive-income company.

Regarding management team compensation, as a general rule executives' remuneration derived from the performance of their functions are qualified as employment income subject to a progressive scale rate of up to approximately 50 per cent. Conversely, capital income derived from dividends or sale of shares are subject to a rate of between 19 and 23 per cent. However, specific case-by-case analysis is required:

- in general, compensation schemes in the form of phantom shares, stock options, etc conditioned to the performance of the executive even if it is also associated to the evolution of the company are regarded as employment income, especially when the shares are delivered with a discount (ie, for a price below their market value);
- however, under certain circumstances the acquisition and further sale of shares by the executive may be taxed as capital income to the extent that, at least:
  - the executive becomes pure owner of the shares;
  - the shares are purchased by the executive at market value with no discount;
  - the executive holds the same economic rights as the rest of the shareholders; and
  - when purchasing the shares the executive assumes a risk derived from a potential impairment of the shares' value; and
- golden parachute and deferred compensation plans are qualified as employment income, thus they are subject to higher taxation.

Although the transfer of shares is exempt from VAT, the purchase of property-rich entities may be subject to Spanish transfer tax (of between 6 and 11 per cent) provided that the real estate assets are not linked to an economic activity.

DEBT FINANCING

Debt financing structures

10 What types of debt financing are typically used to fund going-private or other private equity transactions? What issues are raised by existing indebtedness of a potential target of a private equity transaction? Are there any financial assistance, margin loan or other restrictions in your jurisdiction on the use of debt financing or granting of security interests?

The financing of a private equity transaction depends on the specifics of the transaction (ie, stake of the private equity firm in the case at hand, size of the transaction, number of private equity firms involved, etc). Private equity deals are typically financed with a combination of debt

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and equity. Even though loans provided by banks are very common, alternative financing providers are increasingly popular (ie, debt funds).

When the target of a private equity transaction holds existing indebtedness, it is common practice to refinance the existing debt (and cancel the related security) and to enter into a new financing (and related security). Moreover, existing indebtedness agreements frequently include broad change of control provisions, which is something to bear in mind when it comes to planning the refinancing.

Spanish law prohibits funds being provided (either by way of loans, guarantees or any other kind of financial support – before or after the acquisition) by a target company to third parties in order to allow such third parties to be able to acquire shares or quotas issued by the target company or by any other company in the group of companies to which the target belongs (the scope of the prohibition depends on the corporate form of the company and therefore this matter needs to be carefully analysed on a case-by-case basis). The said financial assistance restriction is certainly broad and it is broadly interpreted in practice.

Debt and equity financing provisions

11 | What provisions relating to debt and equity financing are typically found in going-private transaction purchase agreements for private equity transactions? What other documents typically set out the financing arrangements?

Provisions generally found in various other European jurisdictions are also typically found in Spanish practice.

The financing of a going-private transaction is tailored to the circumstances at hand, depending on factors such as the target company, the total financing needed, the envisaged milestones, etc. The documentation package governing the financing is usually heavily negotiated, precisely because it must be carefully tailored.

In the context of a takeover process, Spanish law sets forth certain provisions in order to ensure the payment of the consideration offered by the bidder. The bidder must hold a bank guarantee or alternative documentation evidencing that a cash deposit has been made at a financial entity that guarantees the payment of the consideration offered by the bidder.

The above-mentioned guarantee or documentation must be filed with the National Securities Market Commission.

Similar provisions apply to non-cash consideration (for the scenarios in which non-cash consideration is allowed).

Fraudulent conveyance and other bankruptcy issues

12 | Do private equity transactions involving debt financing raise 'fraudulent conveyance' or other bankruptcy issues? How are these issues typically handled in a going-private transaction?

Spanish law provides for a clawback action with a reach-back period of two years preceding the declaration of insolvency.

Clawback is not automatic: insolvency proceedings must be initiated (which, in Spain, take place before a judge) and it must be evidenced that the action or agreement in question was 'detrimental to the insolvency estate'. The action or agreement in question can be rescinded if the judge declares the action or agreement as detrimental.

Note that guarantees, security interests, disposals of assets, as well as other actions and agreements, are subject to the above-mentioned clawback action. Consequently, debt financing (and the security package securing the obligations assumed under the relevant financing) used in private equity transactions is subject to the said clawback action.

Bankruptcy issues are normally not very significant in going-private transactions owing to a number of factors, such as the transparency of the process, the fact that the target is listed and the possibility of a competitive takeover being launched.

In the case of actual fraud, pursuant to the Spanish Civil Code the reach-back period to bring a fraudulent conveyance action intended to rescind the contract or payment is four years. Note that, in accordance with the Spanish Civil Code, the action for rescission is subsidiary and cannot be exercised if there are other available recovery mechanisms.

SHAREHOLDERS' AGREEMENTS

Shareholders' agreements and shareholder rights

13 | What are the key provisions in shareholders' agreements entered into in connection with minority investments or investments made by two or more private equity firms or other equity co-investors? Are there any statutory or other legal protections for minority shareholders?

When implementing minority investments, private equity firms try to address the following aspects in the corresponding shareholders' agreement:

- the right to have a seat in the management body (typically a board of directors). Ideally, the private equity firm will try to be overrepresented in the board of directors;
- the right to receive a wide range of information on the company and its business;
- the right to veto certain key corporate resolutions. Such a right is normally structured by setting forth a list of reserved matters for which a super-majority is required at the general shareholders' meeting (for matters that compete the general shareholders' meeting) and the board of directors' meeting (for matters that compete the board of directors);
- the right to have certain specific protections on the transfer of shares: drag-along and tag-along rights, as well as a right of first refusal. In addition, a lock-up is sometimes included in shareholders' agreements, when it is relevant for the private equity firm that a given shareholder or a group of shareholders do not transfer their shares during a certain period of time (typically the management team or the former controlling shareholder, in the case that it is of the interest of the private equity firm that they remain in the equity during a certain period of time after the closing);
- put and call rights, which are used as exit mechanisms (the trigger events are negotiated on a case-by-case basis); and
- deadlock provisions: even though deadlock provisions are not always included in shareholders' agreements, their aim is to avoid situations where shareholders cannot agree on a material issue. Although these clauses are drafted on a case-by-case basis, they normally provide a negotiation period to try to resolve the disagreement and, in case that the negotiation is not successful, one party is normally allowed – or even required – to sell its stake in the company to the other party.

The approach towards shareholders' agreements does certainly differ depending on the stake and the strategy of the private equity firm in the target company. When two or more private equity firms or other equity co-investors carry out a co-investment, the above provisions are tailored to the circumstances at hand. Provided that the stake of the co-investors is – globally – a minority investment, the above considerations would apply.

In response to the second part of the question, it should be mentioned that minority shareholders do have, as a general rule, certain statutory rights under Spanish law, such as, among others, the following (all of them being subject to some requirements and limitations):

- the right of information;
- the right to challenge corporate resolutions;

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- the right to take part in the allocation of profits and in the liquidation quota;
- the right to attend and vote in the general shareholders' meeting;
- the right to request the management body to call a general shareholders' meeting;
- the right to include additional items in the agenda of the general shareholders' meeting;
- the right to request that legal actions are brought against the directors; and
- the right to withdraw from the company (under certain very specific circumstances).

It is important to note that the enforceability of shareholders' agreements is a complex issue under Spanish law. To sum up, shareholders' agreements are, as a general rule, regarded as valid agreements, even though their provisions may face certain limitations when it comes to enforcement from a corporate law standpoint. Consequently, it is highly advisable that the articles of association of the relevant Spanish company mirror, to the extent legally possible, the content of the shareholders' agreement, in order to try to mitigate the referred enforcement limitations. This matter is, however, much more complex and each case requires careful analysis.

ACQUISITION AND EXIT

Acquisitions of controlling stakes

14 Are there any legal requirements that may impact the ability of a private equity firm to acquire control of a public or private company?

The applicable competition and regulatory approvals (including any foreign investment restrictions) concern the acquisition of controlling stakes of both public and private companies by private equity firms (see also question 18).

Moreover, when acquiring control of a private company, restrictions on the transfer of shares set forth by law, by the articles of association and by the relevant shareholders' agreement, if and when applicable, must be taken into account.

When a private equity firm aims to acquire control of a public company, it should be taken into consideration that the thresholds for a mandatory takeover are the following:

- the direct or indirect acquisition of at least 30 per cent of the voting rights of the relevant listed company; or
- the direct or indirect acquisition of any participation below 30 per cent of the voting rights of the relevant listed company and the appointment, within 24 months following the said acquisition, of a number of board members that, together with those already appointed (if the case may be), represent more than half of the total board members.

Should either threshold be met, the private equity firm will have the obligation to launch a mandatory takeover. Mandatory takeovers are subject to a number of statutory requirements and are closely monitored by the National Securities Market Commission.

Exit strategies

15 What are the key limitations on the ability of a private equity firm to sell its stake in a portfolio company or conduct an IPO of a portfolio company? In connection with a sale of a portfolio company, how do private equity firms typically address any post-closing recourse for the benefit of a strategic or private equity acquirer?

Restrictions on the transfer of shares set forth by law, by the articles of association and by the relevant shareholders' agreement are the main limitations to be considered when a private equity firm intends to sell its stake in a portfolio company.

When an IPO is chosen as an exit mechanism, and prior to starting the IPO process, it will be necessary to ensure that the private equity firm has the appropriate mechanisms (towards the remaining shareholders) to implement the IPO process. In particular, shareholders' agreements often regulate IPO scenarios and what majorities and internal approvals need to be observed under such agreement in order to launch an IPO process.

Private equity firms are typically reluctant to give warranties (except for those to title and capacity) and, in general, to assume any contractual obligations that may give rise to an obligation to pay any amounts to the acquirer (no matter if the acquirer being a corporate or another private equity firm). Representations and warranties insurance policies are increasingly popular (especially in controlled auctions), since private equity firms – owing to the nature of their business and their internal rules and restrictions – want to avoid escrow arrangements, price retentions and, in general, the acquirer's ability to recover, totally or partially, the purchase price.

In certain transactions, management provides a limited set of representations and warranties to the acquirer, assuming therefore personal liability, provided that they receive an exit bonus. The liability assumed by management does typically not go beyond the amount of the exit bonus. These are normally cases in which management has had a significant role and the private equity firm has been limited to being a financial investor.

Portfolio company IPOs

16 What governance rights and other shareholders' rights and restrictions typically survive an IPO? What types of lock-up restrictions typically apply in connection with an IPO? What are common methods for private equity sponsors to dispose of their stock in a portfolio company following its IPO?

Corporate governance rules applicable to listed companies are more complex and cumbersome compared with those applicable to private companies. The corporate governance of a company must be adapted so that the said rules are observed following an IPO.

Having said that, Spanish law allows the execution of shareholders' agreements among shareholders of a listed company. These agreements cannot be kept confidential. Rather, they must be disclosed to the concerned company and to the National Securities Market Commission. Further, they must be deposited with the competent Commercial Registry.

As in many other jurisdictions, lock-up restrictions are very common in Spanish practice in connection with IPOs. A lock-up imposes a restriction to the private equity sponsor to transfer its shares after the IPO during a limited period of time (typically a certain number of months, which varies on a case-by-case basis).

In cases in which the sponsor retains a significant amount of shares after the IPO, and once the lock-up period ends, block trades to institutional investors are a mechanism to divest a significant amount of

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shares subject to applicable market abuse, information and disclosure obligations regulations.

Target companies and industries

17 What types of companies or industries have typically been the targets of going-private transactions? Has there been any change in industry focus in recent years? Do industry-specific regulatory schemes limit the potential targets of private equity firms?

Going-private transactions are not, as a general rule, very common in Spain, since the number of companies that are listed in the various stock exchange markets is not as significant as in certain Anglo-Saxon jurisdictions, in which going-private transactions are much more common.

In recent years, there have been various going-private transactions from different industry sectors, such as, among others:

- real estate: Sotogrande was acquired by Orion and Hispania was acquired by Blackstone;
- food: Natra was acquired by Investindustrial and Telepizza was acquired by KKR and others;
- infrastructure: Abertis was acquired by Hochtief;
- construction: Cementos Portland was acquired by FCC; and
- technology: Tecnocom was acquired by Indra.

Note that not all these transactions were led by a private equity sponsor.

See also question 18.

SPECIAL ISSUES

Cross-border transactions

18 What are the issues unique to structuring and financing a cross-border going-private or other private equity transaction?

There are no remarkable specific issues concerning the financing of a cross-border private equity transaction. In any case, financial assistance and corporate benefit limitations and restrictions that may affect the non-Spanish entities involved must be carefully analysed.

In addition, a tax analysis is always performed in order to ascertain which payments flow is the most tax efficient and the structuring is implemented as a result of such tax analysis.

As to the structuring of a cross-border private equity transaction, it should be noted that Spain is an open economy and, as a general rule, foreign investments are welcome. Spain is considered the 12th economy most open to foreign direct investment according to the FDI restrictiveness index prepared by the Organisation for Economic Co-operation and Development.

Legislation on foreign investments establishes a liberalised system. However, there are rules that set forth certain restrictions or limitations on foreign investment on some key sectors, most notably on national defence-related activities. Moreover, some restrictions or limitations also apply to, among others, sectors such as gambling, audiovisual communications or certain financial services. It should be noted that the Council of Ministers can suspend this liberalised system under certain circumstances (ie, if the relevant foreign investment affects, or may affect, public powers, public order, security or public health-related activities).

Legislation on foreign investments is mainly applicable, as a general rule, to non-EU investors (even though certain rules apply to EU investors as well).

In addition, the directors of the concerned listed company may be released from their duty of passivity under certain circumstances, if the country of origin of the foreign bidder does not provide for the duty of passivity in the context of a takeover.

Antitrust clearance must be performed if and when applicable (depending on the countries involved and the relevant thresholds).

Club and group deals

19 What are some of the key considerations when more than one private equity firm, or one or more private equity firms and a strategic partner or other equity co-investor is participating in a deal?

It is highly advisable that there is an agreement among the co-investors setting forth their rights and obligations towards each other in relation to the envisaged investment. However, it is not always the case that an agreement is entered into beforehand (ie, before the signing of the relevant acquisition).

Competition laws must be taken into account regarding the sharing of information on the target company and the calculation of the relevant turnover tests.

In the event that the relevant transaction concerns a listed company, the mandatory takeover thresholds referred to in question 14 will also apply in cases in which various parties act in concert with each other by virtue of an agreement (which may be express or tacit, verbal or written) with the aim of acquiring control of a listed company.

Issues related to certainty of closing

20 What are the key issues that arise between a seller and a private equity acquirer related to certainty of closing? How are these issues typically resolved?

As a general rule, closing is only conditional on antitrust clearance and other mandatory regulatory approvals (if and when applicable).

As far as antitrust clearance is concerned, clauses governing antitrust clearance in SPAs are often drafted in a very seller-friendly way (especially in controlled auctions), 'hell or high water' provisions being quite common.

It is technically possible to subject the closing of a transaction to further conditions precedent. In practice, it is not very common to subject the closing to additional conditions, such as the lack of a material adverse change or any others, as the addition of conditions that are not due to imperative statutory provisions add uncertainty to closing and there must be a strong reason for including any of them.

Termination fees are included in some cases, in the event that either party does not show up on closing or fails to perform all closing actions and deliver all closing deliverables.

Regarding the acquisition of listed companies through takeover bids, it is possible to subject voluntary takeovers to certain conditions. Spanish law foresees a limited list of permitted conditions that voluntary takeovers may be subject to. On the contrary, mandatory takeovers cannot be subject to any conditions. However, both voluntary and mandatory takeovers can be subject to the obtaining of mandatory approvals, such as antitrust clearance or the applicable regulatory approvals.

UPDATE AND TRENDS

Key developments of the past year

21 Have there been any recent developments or interesting trends relating to private equity transactions in your jurisdiction in the past year?

Private equity continues to be active in Spain, with buyouts reaching 85 transactions from the first to third quarters of 2019, worth €12 billion in total. This represents the highest year-to-date figure by volume on record and second by value behind 2018 (€24 billion).

The main industry sectors by deal value from the first to third quarters of 2019 in Spanish M&A deals (not limited to private equity deals) are energy, mining and utilities (21.4 per cent), leisure (14.4 per cent), consumer (14.3 per cent), business services (8.8 per cent), financial services (6.8 per cent) and real estate (6.1 per cent).

Among the top private equity deals in Spain in 2019 were:

- the acquisition of a stake in Compañía Espanola de Petróleos SA by the Carlyle Group (approximately €2.2 billion) (energy, mining and utilities);
- the acquisition of Areas SA by PAI Partners SAS (approximately €1.5 billion) (leisure); and
- the acquisition of a stake in Autopista del Sol, Concesionaria Española SA by Meridiam SAS (approximately €1.2 billion) (construction).

All the above information is taken from Mergermaket, Trend Summary Q1–Q3 2019, EMEA.

According to the Spanish Association on Private Equity (information on the first semester of 2019, released in July 2019), international private equity funds account for 82 per cent of all deals by volume.

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